IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

1.CIVIL WRIT No. 1755 of 2004

NAGENDRA & ORS
V/S
SHREE PRUSHTIKAR SEWA SAMITI & ORS

2. CIVIL WRIT No. 1749 of 2004

NAGENDRA & ANR
V/S
SHREE PRUSHTIKAR SEWA SAMITI & ORS

Date of Order : 13.7.2007

Mr. JK BHAIYA for the petitioner.
Mr. RK THANVI, for respondent no.3 in Writ. No. 1749.

HON'BLE SHRI N P GUPTA,J.

ORDER

These two writ petitions have been filed against the common order of the learned trial court dt. 13.5.2002. By the impugned order the learned trial court has decided two applications; one for impleadment of the party, and the other for amendment of the plaint.

Writ Petition No. 1755/2004 seeks to challenge the part of the order whereby the application for amendment was refused, while Writ Petition No. 1749 seeks to challenge the part of the order whereby the application for impleadment of the applicant has been allowed, and the non-

petitioner no. 3 has been impleaded as party respondent no.3.

The facts of the case are, that the two plaintiffs filed a suit against Pushtikar Seva Samiti through President Chunnilal, and one Mangilal s/o Shri Shankerlal, for perpetual injunction and cancellation of the sale deed, alleging interalia that the property in question was Willed in favour of plaintiff no. 1 by Premdasji, and thus claims to be absolute owner. Then, it is alleged that in the suit property there is old Chowk, Patta whereof was obtained by the grand father of defendant no. 2, by wielding influence, and on that basis obtained permission for raising construction, against which objection was raised to the effect that if construction is raised, the Chowk would be obstructed, and apertures of Bhajandas' property would be adversely affected, the objection of Bhajan Das was accepted. It was alleged that the Chowk is being used by the plaintiffs, peacefully and continuously since then, and it is alleged, that in the front of plaintiffs' house earlier rooms and latrines existed, which were converted by Premdasji into shops, which was objected before the Municipality, and the Municipality rejected the objection, and the matter was compounded, which shop was let out to Chhaganlalji and his brother Narayanlal Panchariya. It is alleged, that the plaintiffs constructed five shops towards the south of the property, after obtaining the permission,

and some of them have been let out, and are functional. Then it is alleged, that the office bearers of defendant no.1 bear enmity against the plaintiff no.1, as the plaintiffs' house is a sole house of his community, and somehow they want to force him to quit from Phalodi. With this, it is alleged that office bearers of defendant no.1, in collusion with defendant no. 2, executed a sale deed in favour of defendant no. 1 with respect to the property, title whereof nowhere exists. On that basis office bearers of defendant no.1 brought building material, and dumped it in front of plaintiffs' shop. Thereupon information was sent to police authorities, but in view of the influence of the defendant no.1 nothing was done. Encouraged thereby office bearers of defendant no.1 have put stones in front of the shutters of the shop, which has resulted in closure of the shop, which is causing irreparable loss, and due to the influence of office bearers of defendant no.1, some of the shops are not being let out, as nobody comes forward to take them. Interalia with these averments, it is prayed, that the stone slabs put across the shutters be removed, and the sale deed executed in favour of defendant no. 1 by defendant no. 2 be cancelled, and it be declared void, and the compensation is also claimed.

Two sets of defendants filed separate written statement, raising various disputes, about the right of Premdas to execute Will, so also regarding nature and title

of the Chowk. The allegations of influence were denied. It was pleaded regarding Chowk that objections had been turned down, and that 145 Cr.P.C. proceedings were initiated, wherein property had been attached, and that, the shop constructed, is illegal. It was alleged that the plaintiff has constructed only one shop, while the remaining land behind the shutters is open, and are not even in the shape of shops, and the allegation to compel the plaintiff to close the shop was denied. It was alleged, that sale deed was rightly executed in favour of defendant no.1 by defendant no.2. Defendant no.2 filed a separate written statement, interalia contending, that the land in question is not in his possession, and it was also pleaded, that the defendant no.2 has never sold land to defendant no.1, nor the possession has been delivered, rather on inspection of the file it transpires, that the sale deed has been executed on the basis of power of attorney, while no such power of attorney was given, nor could it be given by him alone, as there are various other heirs of Surajmalji, and that the power of attorney is a forgery, and he is not bound by it. It was also prayed, that prosecution be launched against the delinquents for the offence under Section 467, 468 and 471 I.P.C. This written statement was filed on 16.5.1991.

Thereafter on 5.1.2002 the application for amendment was filed by the plaintiffs, on the basis of the

pleadings taken by the defendant no. 2 in his written statement, seeking to add the challenge to the order of the appellate authority setting aside the Municipal Board's order, and plead, that the land is of public Chowk, and also seeking to plead, that defendant no.2 never executed power of attorney etc. This application has been dismissed by the learned trial court, by holding, that the pleadings sought to be added in the plaint do already exist on the record in the written statement of defendant no.2, and therefore, allowing the plaintiff to add the pleading would unnecessarily enlarge the scope of the suit, and the pleadings are not necessary for deciding the real controversy between the parties, apart from the fact, that it will have the effect of changing the nature of the suit as well.

In my view as noticed above, the suit of the plaintiff is for cancellation of the sale deed, and for declaring it null and void, mainly on the ground of sale being collusive between defendants no. 1 and 2, and may be on the ground of denial by defendant no. 2, denying to have ever executed any sale deed, or the power of attorney, since the pleading is there on the side of the defendant no.2, the plaintiff, he if so likes, can very well make use of the admissions made by the defendant no.2, but then the plaint cannot be allowed to be amended on that count. It is a different story, that amendment application has been

filed after a long delay of about 11 years, without any pleading about the facts, to satisfy the requirement of proviso to O. 6 Rule 17 C.P.C. as it exists.

In that view of the matter, I do not find any error in this part of the order of the learned trial Court, and the writ petition no. 1755 is, therefore, required to be, and is dismissed.

So far Writ Petition No. 1749 is concerned, application had been filed by Shree Dwarkanath (Dwarkadheeshji) Mandir Public Trust through trustee and Chairman Bal Krishan, under O. 1 Rule 10 read with O. 22 Rule 10 C.P.C., alleging interalia, that the suit has been filed regarding the property situated behind the temple of Dwarka Nath Ji, while the property is situated just behind the NIZ temple, and is a part of the temple, the temple and the disputed property belonged to the Maheshwari community, who have created the applicant trust, which trust has been registered as well, and the property has thus vested in the trust, and the applicant trust is, therefore, necessary party, and in absence thereof, effective decree cannot be passed. The application was opposed on the ground, that the disputed property is not the property of the trust, and trust has nothing to do with the property. The learned trial court found, that the applicant is a necessary party, and is required to be added as party.

During the course of hearing, learned counsel for the newly added applicant submitted, that if the plaintiff is prepared to agree, to the effect, that whatever decree may be passed in the present suit shall not bind the applicant, then the applicant may not be impleaded as party. Learned counsel for the petitioner at one point of time agreed to the suggestion of the learned counsel for the applicant, however, when I started dictating the order, learned counsel backed out, and submitted, that the Court may give this direction, without recording his concession. Obviously, if the learned counsel does not want to concede, the Court need not force him to concede this, and without concession, without going into the merits, the Court is not expected to pass this type of orders.

On the other hand, this act of the learned counsel for the petitioner, even by itself, does clearly makes out, that the applicant is a necessary party, otherwise he would have plainly conceded, or allowed the party to be impleaded. In that view of the matter, I do not find any error in this part of the order either. The Writ Petition No. 1749 is also, therefore, required to be, and is dismissed.

In view of the above, both the writ petitions are dismissed summarily. The learned trial court is directed to expeditiously decide the main suit.

(N P GUPTA),J.